IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TEASTAMENTARY & INTESTATE JURISDICTION

NOTICE OF MOTION NO.72 OF 2005

IN

PETITION NO.757 OF 2004

...

Mrs.Coomim Wellington ...Deceased

Mr.Burjor S. Shroff ...Petitioner

v/s.

Mr.Behram J. Mistry ...Respondent

...

Mr.Nawalo i/b M/s.Bhutta & Associates for the Petitioner.

Respondent in person.

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CORAM: D.K.DESHMUKH, J.

DATED: 21ST JULY, 2006

P.C.:

By this Notice of Motion, the Respondent prays for an order dismissing the petition No.757 of 2004. Petition No.757 of 2004 has been taken out for probate of the Will. Admittedly, there are attesting witnesses to the Will.

2. Objection of the Respondent is that according to Section 281 of the Succession Act, petition filed for probate has to be verified by one of the attesting witnesses. Petition as filed is not verified by any attesting witness. Section 281 of the Succession Act reads as under:-

> 281.Verification of petition for probate, by one witness to Will.- Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the will (when procurable) in the manner or to the effect following, namely:-
>
> "I(C.D.), one of the witnesses to the last

> Will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or mark) thereto (or that the said testator acknowledged the writing annexed to the above petition to be his last Will and testament in my presence)."

3. It is required by Section 281 that the petition should be verified by one of the attesting witnesses. Admittedly, petition has not been verified by one of the attesting witnesses. Affidavit of one of the attesting witnesses has been filed. Despite direction issued by the Court, copy of that affidavit has not been served on the Respondent. Probate petition is required to be verified and the verification of the petition has to be in Form-III. Verification given by the Petitioner is not in Form-III. Despite the Respondent points out this defect in the petition, the Petitioner has done nothing. Therefore, in my opinion, it would be in the interest of justice to grant this Notice of Motion. Notice of Motion is, therefore, granted in terms of prayer clause (a). Motion disposed of.

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